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In the Supreme Court of the United States

L. V. MULLEN ET AL,
Plaintiffs in Error,

VS. No. [illegible]

ANDERSON GARDNER, ET AL,
Defendants in Error.

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AUTHORITIES CITED

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In the Supreme Court of the United States

L. V. MULLEN ET AL,
Plaintiffs in Error,

VS. No. 146

ANDERSON GARDNER, ET AL,
Defendants in Error.

STATEMENT OF CASE

The plaintiffs in error, L. V. Mullen and J. S. Mullen, filed this suit in the District Court of Stephens County, Oklahoma,, alleging that they were owners in fee simple, and in the actual peaceable and exclusive possession of certain lands in Section 7, Township 5 South, Range 2 East; and in Section 25, Township 1 South, Range 2 West; and in Section 23, Township 8 South, Range 2, West; and in Section 4, Township 3 South,

Range 7 West; and in Section 18, Township 4 North, Range 7 West; and in Section 3, Township 5 South, Range 2 East; and in Section 8,Township 5 South, Range 7 East; and in Section 34, Township 4 South, Range 2 East; the same being the allotment of Wilkin Gardner; and that they derived their title to said lands by reason of the fact that the lands in controversy were allotted to and in the name of Wilkin Gardner, deceased, after his death; that at the time of the death of the said Wilkin Gardner he left surviving him as his sole and only heirs the defendants, Wilson Gardner, Anderson Gardner and Nancy Gardner, who inherited the allotment of the said Wilkin Gardner, deceased; that thereafter, and on the 6th day of January, 1906, the defendants Wilson Gardner, Anderson Gardner and Nancy Gardner, for a good and valuable consideration, made, executed and delivered their certain deed of conveyance to the following described lands, to-wit:

The E½ of NW¼ of SE¼; the S½ of NE¼ the NE¼ of SE¼; the N½ of NW¼ of SE¼; the SE¼ of NW¼ of SE¼; the NE¼ of NE¼ of SW¼, Section 6 Township 3 South, Range 1 East;

Conveying Same to Mrs. Hattie Mitchell, and that they warranted the title to the same to the said Mattie Mitchell, and further covenanted that if for any reason the lands hereinbefore described as filed upon, selected and allotted to the said Wilkin Gardner, should be adjudged by any tribunal now in existence or that might

hereafter be created not to be the land of the said Wilkin Gardner, then, in that event, the administrator or his successor, shall file upon and select other lands of equal appraised value to those described herein, and that all the warranties and covenants shall extend to and cover said lands so selected, filed upon and alloted, and this conveyance shall extend to and convey all such land, and if for any reason it should be necessary for another deed to be executed in order that the title in fee simple shall pass to the said Mrs. Mattie Mitchell, then and in that event, the said said grantors, for themselves, their heirs, executors and administrators, represented and warranted unto the said Mattie Mitchell, her heirs and assigns, that they would execute such a deed, conveying the same as aforesaid; and that said deed was regularly recorded in the office of the Register of Deeds of the County wherein said lands were situated, and attached to said petition a copy of said deed. It was then alleged that Mrs. Mattie Mitchell conveyed and sold by warranty deed the land so conveyed to her to Bonner and Mullen, and that Bonner conveyed all his interest in and to said lands to J. S. Mullen and to such land as was selected in lieu thereof. It was then alleged that on the 6th day of January 1906, Wilson Gardner, Anderson Gardner and Nancy Gardner conveyed by warranty deed to J. S. Mullen and L. V. Mullen the following described land, to-wit:

The E½ of NW¼ of SW¼, Section 8 Township 5 South, Range 7 East; the NW¼ of SW¼ of SE¼, Sec-

tion 3, Township 5 South, Range 2 East; the SW¼ of NE¼ of SE¼, Section 34, Township 4 South, Range 2 East, being a portion of the allotment of Wilkin Gardner, deceased: and that said grantors warranted the title to the same.

In said deed of conveyance it is further covenated:

> "And if for any reason the lands herein-before filed upon selected and allotted by said Wilkin Gardner should be adjudged by any tribunal not to be the land of the said Wilkin Gardner, then and in that event the administrator or his successor should select, file upon and allot other lands of equal appraised value of that described in said deed, and that this conveyance shall extend to and convey all of said lands so selected, filed upon and allotted, and that this conveyance shall extend to and cover all said lands, and if for any reason it should be necessary for another deed to be executed in order for title in fee simple to pass to the said J. S. Mullen and L. V. Mullen, then and in that event we do for ourselves, our heirs, executors and administrators, represent and warrant unto the said J. S. Mullen and L. V. Mullen, their heirs and assigns, that we will execute such conveyance conveying the same as aforesaid."

That said conveyance was regularly recorded in the office of the Register of Deeds of the county wherein said land was situated on the 22nd day of May, 1906, and a copy of said deed was attached to plaintiff's petition. It was then alleged that the lands mentioned in

paragraphs 3 and 5 of the petition filed in the trial court were first selected and filed upon and constituted the entire allotment of Wilkin Gardner, deceased, and that the filing on all of the lands mentioned in paragraph 3 of said petition filed in the trial court, was cancelled and a portion of the land described in paragraph 1 of plaintiff's petition in the trial court was filed upon and allotted to Wilkin Gardner in lieu of the lands from which his first filings were cancelled, and that patents issued to and in the name of Wilkin Gardner for the lands so selected in lieu of the lands for which the filing was so cancelled; and that by the terms of said deeds, "Exhibits D and C" to plaintiffs' said petition in the trial court, all the rights in and to the lands selected in lieu of the lands conveyed in paragraphs 3 and 5 of plaintiffs' said petition were conveyed by the deeds aforesaid mentioned to these plaintiffs in error, and all of the rights, titles and privileges accompanying ownership inured to the benefit of these plaintiffs to all the lands allotted to and in the name of Wilkin Gardner, deceased.

It was then alleged that the plaintiffs have been in possession of said lands from before the time of filing and up to and including the present time, under said deed as aforesaid, and have been collecting the rents, revenues and profits from the same and enjoying all the rights of ownership, and the defendants, Wilson Gardner, Anderson Gardner and Nancy Gardner, are asserting some right, title or estate in and to said lands described in paragraph one of plaintiffs' petition, by

reason of being the heirs of Wilkin Gardner, deceased; and that the pretended claim of the defendants was without right, and that said defendants had no right, title, or interest in or to said lands, they having conveyed the same by their said deeds as aforesaid. It was then alleged that the pretended claim constituted a cloud upon the title of these plaintiffs and that unless the same was cancelled and set aside the plaintiffs would suffer irreparable injury. It was then alleged that the said defendants were trying to sell said lands to other parties, and unless prevented by restraining order they would sell the same and thereby further cloud the title of these plaintiffs.

The prayer of the petition was, first, that the defendants in error be enjoined and restrained from making, executing or delivering any deed or conveyance on the lands mentioned in paragraph 1 of the petition and from disturbing the plaintiffs in their said possession pending the judgment of the court, and praying for a temporary restraining order restraining defendants from executing any deed covering the lands in paragraph 1 of said petition, and that the defendants be decreed to convey said premises to the plaintiffs herein by warranty deed and in default thereof that the court require, by order, the sheriff of the county to make, execute and deliver to the plaintiffs a warranty deed to said lands described in paragraph one of plaintiffs' said petition, and that the court order and adjudge that the same shall be and have the same effect as if executed

by the defendants in their own person; and praying further that the defendants be required to set forth the nature of their claims, if any, and that the court decree the plaintiffs' rights and title to the lands as described in paragraph one of plaintiffs' said petition, being the lands allotted to Wilkin Gardner, to be valid and perfect and the defendants have no right, title or claim therein, and the defendants, and each of them, be perpetually barred and enjoined from setting up, or asserting any title or interest in said premises adverse to this plaintiff, and for such other and further relief as they are entitled to. (See Trans. of record, pages 14 to 28 inclusive.)

The defendants interposed their demurrer, as shown on page 28 of the transcript of record, and thereafter filed their answer, wherein they admit the allotment of the land in the manner set out in plaintiffs' said petition, and admitted the deeds were executed to the plaintiffs in error and their grantors to the lands as selected in the name of Wilkin Gardner, deceased. The defendants in error denied that the plaintiffs in error were the owners of the land described in paragraph one of plaintiffs petition in the trial court, except the NW½ of SW¼ of SE¼ of Section 3, Township 5 South, Range 2 East, and the SW½ of NE¼ of SE¼ of Section 34, Township 4 South, Range 2 East, and the NE¼ of NW¼ of SE¼ of Section 8, Township 5 South, Range 7 East; and they deny that any other land had been designated, selected or alloted to or in the name of

Wilkin Gardner or his heirs. The defendants in error admitted the death of the allottee prior to the selection of the lands, and that Wilkin Gardner left surviving him as his only heirs Wilson Gardner, Anderson Gardner and Nancy Gardner, his wife, and then alleged that Nancy Gardner was dead. It was then alleged that Wilkin Gardner was entitled to have set apart and allotted to him 320 acres of the average allotable lands of the Chickasaw and Choctaw Nations; that he died before the lands had been selected for him; that subsequent to the death of Wilkin Gardner the said Wilson Gardner and Anderson Gardner, who were both duly enrolled full-blood Indians of the Choctaw Tribe, were entitled to have selected and alloted in the name of their deceased brother, for their sole benefit, said acreage of lands from the tribal lands of the Chickasaw and Choctaw Nations.

It was then alleged that Howard McBride, administrator of the estate of Wilkin Gardner, deceased, on the 3rd day of January, 1906, appeared before the Commissioner to the Five Civilized Tribes and had designated and selected from the tribal lands of said two tribes of Indians, the thirty acres of land described specifically in paragraph 2 of their said answer, the same thirty acres of land described in paragraph 1 of plaintiffs' petition; that no other lands other than the thirty acres were designated, selected or allotted in the name of Wilkin Gardner until the 9th day of September, 1910,

at which time, it was alleged by the defendants in error, there was arbitrarily selected and allotted from the tribal lands of the Chickasaw and Choctaw Tribes of Indians, in the name of Wilkin Gardner, the lands particularly described in paragraph 1 of plaintiffs' petition in the trial court, and that the lands thus selected and the 30 acres aforesaid constituted the entire allotment of Wilkin Gardner, deceased. It was then alleged that they being the heirs at law of Wilkin Gardner, they are now, and have been since the arbitrary selection of said lands as aforesaid, the joint owners in fee simple of the lands described in paragraph 5 of their said answer, and that they have not executed any deed or contract conveying said land or any part to the plaintiffs or any person through whom they claim. It was then alleged that the plaintiffs claim title through their deed as of date January 6, 1906, and the covenants therein. but that said deeds and covenants were in conflict with the laws, treaties, rules and regulations, and that they operated against the plan and policy of the Federal Government in the proper distribution of the tribal lands. There were further allegations in the answer, but we deem them immaterial for the purpose of presenting the question of law that we will hereafter raise.

The prayer of the answer was that the relief prayed for by the plaintiffs in error be denied and that the

defendants in error be decreed to be the owners of the title, and that the conveyance of the plaintiffs in error be cancelled as a cloud upon their title. The answer of the defendants in error will be found commencing on page 30 of the transcript and ending on page 34 thereof.

There was a demurrer to this answer filed, which demurrer was overruled. (See transcript page 35.)

The death of Nancy Gardner was suggested, as shown on page 36 of the transcript and the case was revived. The plaintiffs in error then filed their reply wherein they denied all and singular the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, reserving, however, their demurrer and exceptions to paragraph 10, as shown by their demurrer.

For further reply the plaintiffs in error stated that Wilson Gardner and Anderson Gardner received of the plaintiffs and their grantors $1041.00 as the purchase price of the allotment of Wilkin Gardner, deceased, which said sum of money was paid to the defendants in error in full consideration for the land first selected by the administrator, and that by the covenants in said conveyance said sum of $1041.00 was made the consideration for the lands involved herein.. (See transcript pages 36 and 37.)

The defendants filed their amended answer, wherein they tendered something over $600.00, which sum of money they said they had received.. The cause proceed-

ed to trial, and Mr. H. A. Ledbetter, representing the plaintiffs in error (plaintiffs below) made his statement; and thereafter Mr. Martin, one of the attorneys for the defendants in error (defendants below), made his statement; which statement so made will be found commencing on page 39 and ending on page 41 of the transcript; and after said statements were made a motion for judgment upon the pleadings was filed, which said motion was overruled and exceptions saved; thereupon motion for judgment upon the opening statement of counsel was made, which motion was by the court overruled and exceptions were saved. (See bottom of page 41 transcript.) The cause then proceeded to trial, as shown commencing on page 42 of the transcript.

The testimony in the case shows, in short, that an application for the lands selected in January, 1906, was made before the Commissioner to the Five Civilized Tribes, as shown on pages 42 and 43 of the transcript, and that this application was denied (transcript, page 45.)

Other lands were applied for by Howard McBride as administrator, as shown on pages 45 to 69 inclusive, of the transcript, which application was denied.

A contest was instituted by Howard McBride for the lands described in his application and this contest was decided adversely, with the exception of a portion

of the lands in controversy, all of which is disclosed by the transcript commencing with the contest proceedings and ending on page 71 of the transcript. It appears that after the contest was filed the plaintiffs in error and their grantors took deeds from the heirs of Wilkin Gardner, deceased with covenants for a deed in the event the lands particularly described in the deed were lost in contest. The testimony further shows, as disclosed on page 81 of the transcript, that Howard McBride as the administrator of the estate of Wilkin Gardner, deceased, requested the Commissioner to the Five Civilized Tribes to allot the lands involved in this controversy to Wilkin Gardner, and that the allotment was made in accordance therewith. The homestead and allotment patents were then offered in evidence, as shown on page 91 to 93 inclusive of the transcript.

The testimony further shows that Mrs. Mattie Mitchell conveyed the lands to W. M. Bonner and J. S. Mullen, as disclosed at page 94 of the transcript, and that Bonner thereafter conveyed the lands to J. S. Mullen. The testimony further showed that the plaintiffs in error were in possession of the land. (See transcript, page 97.) The testimony further showed that Wilkin Gardner died in the fall of 1905; that at the time of his death he left as his only heirs the parties who signed the original deeds. The testimony further shows that Wilson Gardner died in the year 1903, and left sur-

viving him Lena Gardner, his widow, and Anderson Gardner, his brother. It is further shown by the testimony that the said heirs executed a deed to the lands in controversy to J. W. or W. J. Whiteman, and the deeds were recorded in the month of February, 1913. This is shown on page 97 of the transcript. This was all the testimony of the plaintiffs in error.

There was testimony offered by defendants in error on matters which we do not feel is material, but all the testimony of the defendants in error admit the facts as set out in the petition in the trial court, and upon which we rely for a reversal of this case. The trial court disagreed with our contention as to the law and entered judgment against us, as shown on page 134 of the transcript.. A motion for a new trial was then filed, was overruled and exceptions were saved, and the case-made and petition in error was filed in the Supreme Court of Oklahoma; and in said petition in error it was alleged as error as follows:

First. That the trial court erred in overruling the motion of the plaintiffs in error for a new trial;

"*Second*: That the trial court erred in holding that the heirs of a deceased Indian who had inherited lands of the Chickasaw-Choctaw Nations under section 22 of the Supplemental Treaty of September 25th, 1902, could not alienate such land so inherited, and erred in holding that an agreement to convey such lands so inherited be-

fore selection was violative of the Treaties between the Chickasaws and Choctaws and the United States, and the trial court erred in refusing to hold valid such a conveyance in favor of the plaintiffs in error;"

(See transcript page.....for petition in error.)

The Supreme Court of the State of Oklahoma, upon hearing said petition in error affirmed the decision of the District Court of Stephens County, Oklahoma, for opinion of court see pages.....to.....of transcript. Thereupon plaintiffs filed their petition for writ of error to the Supreme Court of the United States, and filed their assignment of errors, and said writ of error to this Court was duly allowed. See page..... of transcript

SPECIFICATION OF ERRORS

We only desire to urge the following assignment of error.

"The Supreme Court of of the State of Oklahoma, erred in its construction of Section 22 of the Act of Congress of 1902, ratified by treaty September 25th, 1902, (32 Stat a L.....) wherein said Supreme Court of the State of Oklahoma, held that the deed executed by the defendants in error herein was insufficient to convey the lands selected in lieu of the lands described in said conveyance, for that under said deed so executed, and by reason of said Section 22 of the Act of Congress

ratified September 25th, 1902, the lands so selected in allotment were inalienable and the heirs who inherited said lands, and being the defendants in error herein, were unrestricted in their right of alienation of said lands, and under said conveyance so executed by said heirs, they, the said defendants in error, being citiensz of the United States without restraint as to the character of land, they the said defendants in error, Anderson Gardner and Phelin Gardner, had a lawful right to convey any land that might be selected in lieu of the lands decsribed in said conveyance, and that the defendants in error had a right to contract to convey any lands that might have been selected in lieu of the lands described in the conveyance." (See trans. page 6).

BRIEF AND ARGUMENT.

We feel that there is but one question of law involved in this law suit, and that question is raised in our assignment of error, above quoted.

It is our contention that when a member of the Chickasaw or Choctaw Tribes of Indians died prior to the selection, under Section 22 of the Supplemental Treaty between the Chickasaws and Choctaws and the United States (32 Stts. at Large, 641), the lands the heirs are entitled to, are granted to them by the Government of the United States, and to such an extent that the lands these heirs are entitled to can be alienated by them prior to selection, and that when the selec-

tion is made and the patents therefor issue, by the doctrine of relation, the lands so alloted would inure to the benefit of the grantees. We maintain that there is a distinction between this character of estate in lands from that of the land of a member of the Choctaw or Chickasaw Tribes of Indians is entitled to take for himself; and we feel and believe that when this court shall have read carefully the decision of the Supreme Court of the United States in re Mullen-Jansen vs. United States, 224 U. S., 448, our position will be sustained.

We realize, if the court please, that the Supreme Court of Oklahoma has held in the case of I. P. Bledsoe vs. Wortham, 35 Okla., page 261 (129 Pac., 841), and Lynch vs. Franklin, 36 Okla., page..... (130 Pac., 599)—the latter case having since been affirmed by the Supreme Court of the United States—that a conveyance made prior to the selection was in contravention of the Treaties and Acts of Congress, but we wish to call the court's attention to the fact that in the Bledsoe-Wortham case, *supra*, Justice Williams said:

> "The question of constructive allotment, or where the party had done everything reasonably within his power to select his allotment, by making application, etc., but being wrongfully refused, etc., is not in this case, and as to such probable exception we express no opinion."

So the court will see that the question presented here at this time is an open question and one, to our mind, that should be distinguished from the Bledsoe-Wortham and the Lynch-Franklin cases, *supra*.. Bearing in mind, if the court please, that had Howard McBride as the administrator of the estate of Wilkin Gardner, deceased, been successful in his contest that the plaintiffs in error here would have had the title in fee simple to the lands first selected in allotment, for as a matter of fact and as a matter of law the selection would date from the time of the filing of the application for the land, and Wilkin Gardner having died prior to his selection, the lands both the homestead and surplus, were alienable. (See Mullen-Jansen vs. United States, *supra*.) It was intended by these Indians to convey the landed estate granted them under section 22 of the Suplemental Treaty between the Chickasaws and Choctaws and the United States. This estate, if the court please, was one in the nature of an estate in expectancy, and they were citizens of the United States, freed from all restrictions as to this character of allotment—as was held in the Mullen-Jansen vs. U. S. case, *supra*. Now, when the contest was lost, and when the defendants in error had agreed by their solemn deed of conveyance to convey such other lands as might thereafter be allotted to the said Wilkin Gardner, we at this time challenge the defendants in error to cite us a single decision of a single court of

the Union, and we likewise challenge the defendants error to cite us to a single Act of Congress, or a single provision of any treaty, that prohibits the making of such a contract for conveyance as was made by the defendants in error in this case, as of date January 3, 1906; and, if there be no inhibition against the making of such a contract, why should not a court of equity enforce the same? The policy of the law, as we have always understood it, is to enforce contracts that are lawfully made, unless there is some inhibition against the enforcement of the same.

We invite the court's careful attention to the case of Mann vs. Wilson 64 U. S (23 Howard, 457.) In this case the Indian conveyed by warranty deed before there was even a survey made, and prior to selection, and many years thereafter the land was surveyed and selected. The Indian then died and the heirs claimed that the deed made by their ancestor was void because made prior to selection, but the Supreme Court of the United States held that, by the doctrine of relation, when the selection was made the title to the land inured to the benefit of the grantee. This case is followed in Crews vs. Burcham, 1 Black, 352 (17 L. Ed., 91); Jones vs. Meehan, 171 U. S., page 1; 154 U. S., 163; see also Skipworth vs. Martin, 50 Ark., 41; 46 Ark., 285; 62 U. S., 228; 85 U. S., 805; 99 U. S., 324; 20 Wallace, 590; 14 Minn., 544.

We deem it not necessary to argue and present au-

thorities upon the question that "The intention of the parties, when manifest or where ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or dry words of the contract, unless that intention is directly contrary to the plain sense of binding words of the agreement," for this doctrine is so well settled that we deem it not necessary to cite authorities in support thereof; but it is evident that it was the intention of the defendants in error to convey the landed estate of Wilkin Gardner, and by their solemn conveyance a court of equity should decree the same.

In the case of Mullen-Jansen vs. United States, *supra*, we desire to call the courts especial attention to the fact that the court there said, in effect, that where lands were allotted under Section 22 that this character of land was a grant from the Government direct to the heirs, and that there were no restrictions against the right of alienation of such lands, and Justice Hughes, in writing the opinion, cited the cases of Mann vs. Wilson; Crews vs. Burcham; Jones vs. Meehan, *supra*, in support of the doctrine here contended for, and we can but feel that the cases cited, *supra*, are squarely in point as to this character of an estate.

Respectfully submitted,

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